Concerns with the Draft Education and Training Reform Regulations 2017

1. The Department of Education and Training has issued draft Regulations which are proposed to be made under the *Education and Training Reform Act 2006*.


3. The draft Regulations will empower the Victorian Registration and Qualifications Authority to refuse parents the ability to home school their children.

4. This document summarises the key concerns from a legal and human rights perspective.

The draft Regulations undermine human rights

5. The draft Regulations undermine the human rights of parents and their children. They propose to confer on the VRQA the power to refuse parents the ability to register their child for home schooling, without specifying any criteria relating to the exercise of that power, and without containing any requirement of procedural fairness.

6. Refusing an application for registration of a child as a student for home schooling would deny parents the right to determine the most appropriate education for their children, and may have a significant impact on a child’s educational, emotional and psychological well-being.

The draft Regulations are not authorised by the *Education and Training Reform Act 2006*

7. The draft Regulations go beyond the power conferred by the *Education and Training Reform Act*, which means that it is likely that they could be struck down as invalid. This is because:
   - The courts will not readily find that regulations can confer power to refuse the ability to home school without express authorisation in the Act.
   - The Act does not give the Minister the power to make this kind of regulation.
   - The Act states that “parents have the right to choose an appropriate education for their child”. The courts will likely not allow the Minister to make this kind of regulation when it contradicts a foundational principle of the Act.

The draft Regulations contain no criteria

8. The draft Regulations contain no criteria by which an application for registration of a child as a student for home schooling may be decided.

9. This creates a risk that these powers will be exercised arbitrarily, which is inherently undesirable in a society which values the rule of law and accountability for the exercise of public power.

The draft Regulations contain no requirement of procedural fairness

10. The draft Regulations contain no requirement for the VRQA to afford procedural fairness when considering applications for registration.

11. This means that the VRQA could refuse an application without giving the parent any prior warning of its intention to do so, and without providing reasons for the refusal.
The draft Regulations are biased against home schooling

12. The draft Regulations contain an implicit bias against home schooling, contrary to the principle that parents have the right to choose an appropriate education for their child.

13. Parents who want to home school their children will need to satisfy the VRQA that they are able to adequately teach their children. But the VRQA has no obligation to be satisfied that there are satisfactory alternatives to home schooling.

14. If the VRQA refuses an application, the parent will be required to register the child with a school. This assumes that there are school options available which provide adequate instruction and which are otherwise suitable for the child.

15. However, this will not always be the case. Parents who decide to home school their children typically do so due to inadequacies and failings with the school system, including wanting to ensure their children are free from bullying.

16. This may have the outcome that a parent is required to register their child with a school system that has failed to provide a satisfactory educational experience, and which, in some cases, may have actively harmed the child.

Suggested changes to the Regulations

17. For these reasons, the draft Regulations expose the VRQA, the Department and the Minister to significant legal and reputational risk.

18. The sections of the draft Regulations which relate to home schooling should be struck out.

19. If not, the draft Regulations should be amended to include requirements of procedural fairness and criteria by which an application may be decided.

20. The draft Regulations should also include a “satisfactory alternative” criterion: that is, before rejecting an application for registration, the VRQA should be required to be satisfied that there is a satisfactory school alternative to home schooling reasonably available to the child.

Additional comments

21. Regulations can be disallowed by either house of Parliament. This would require a majority of members of the Assembly or the Council to vote in favour of disallowance. The government has a majority in the Assembly and would be unlikely to disallow the Regulations.

22. A court will also have the power to strike down the Regulations as invalid.

23. Note that any decision made by VRQA will be subject to review in VCAT. If VRQA refuses an application for home schooling, the affected parent will have the right to apply to VCAT to have the decision overturned, and will also be able to require the VRQA to provide reasons for the decision.

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